IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13384 of 2004

with

SPECIAL CIVIL APPLICATION NO. 1176 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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H K DHRUVA - Petitioner(s)
Versus
UNION OF INDIA - Respondent(s)

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Appearance :
PARTY-IN-PERSON for Petitioner(s) : 1,
MR MUKESH A PATEL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 27/9/2007

CAV JUDGMENT

1. H.K. Dhruva, petitioner, party-in-person,

has filed this petition under Article 227 of the Constitution of India with a prayer that this Court may be pleased to quash and set aside judgement and order dated 19.6.2006 passed by the learned Judge, City Civil Court, Ahmedabad, in Civil Miscellaneous Application No. 109 of 1992 and 150 of 1992 by which the learned Judge has directed the General Manager of railway Administration to appoint Arbitrators to resolve the dispute and differences arose by the Contractor as it was in existence at the time of passing the order by this Court on 31.3.1986 and for that letter of panel and finalisation of suggestion of nominee be done on or before 31.7.1996. He further pressed that thereafter the arbitration work should be completed within a period of four months latest by 30.11.1996. The General Manager is directed not to include any instruction to the Arbitrator regarding the admissibility of any claim or counter-claim but such plea can be raised in written statement before the Arbitrator if find necessary. The petitioner further prayed to allow fully the

application of the petitioner in Civil Miscellaneous Application No. 150 of 1992 and to appoint Arbitrator of this Court's choice to resolve the dispute. The petition was filed on 29.12.2004. When the matter was placed for hearing, this Court issued notice. Thereafter, this Court passed various orders from time to time. Thereafter, this matter was heard partly and though the roster was changed but ultimately in view of the order of the Hon'ble the Chief Justice the matter was again placed for hearing before this Court and that is why the matter has been heard by this Court finally.

2. The facts giving rise to this petition are as under:

2.1 Mr. H.K. Dhruva, party-in-person – petitioner, was a Contractor and carried on his business of contracts from his office situated at A/2, Kahan Nagar Flats, 7, Panchnath Plots, Rajkot, at the relevant time. The Railway issued tenders of providing the work of approach road

and circulating area in Hapa-Yard, Jamnagar. The petitioner filled up the tenders and as the petitioner's tender was found to be the lowest tender for the said work, the Western Railway Administration accepted the same and thereafter the Railway and the petitioner entered into a Contract Agreement No. 151 dated 15.6.1979. The said contract was executed between the Railway and the petitioner at Rajkot. Clauses 62 and 63 of the said Contract read as under:

2.2 “Clause 62 – All disputes or differences of any kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions, directions and certificates with respect

to any matters decision of which is specially provided for by these conditions, given and made by the Railway, or by the Engineer on behalf of the Railway, which matters are referred to hereinafter as Excepted Matters shall be final and binding upon the Contractor and shall not be set aside or be attempted to be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without Appeal.

2.3 Clause 63 - If the Contractor be dissatisfied with the decision of the Railway, on any matter in question, dispute or difference, on any account or as to the withholding by the Railway of any certificates to which the Contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time, then and in any such

case but except in any of the Excepted matters referred to in clause 62 of these conditions the Contractor may within 10 days of the receipt of the communication of such decision or after the expiry of the reasonable time as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the Contractor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the the demand has been made and no other shall be referred to arbitration. “

2.4 The terms and conditions of clause 62 of the Contract provide that all disputes or differences shall be referred by the Contractor to the Railway and the Railway shall make and notify decisions thereon within a reasonable time. Clause 63(1) provides that if Contractor is

not satisfied with decisions notified by Railway, he may demand that such matter in question, dispute or difference be referred to arbitration, specifying the matters which are in question, dispute or difference. “And only such dispute or difference of which the demand has been made, and no other shall be referred to arbitration”.

2.5 Clause No. 63(3)(a) and (b) provides machinery for appointing Arbitrators to whom such “matters in question, dispute or difference to be arbitrated upon shall be referred for decision.” It provides that for claims of Rs. 3 lacs and below, the General Manager or his nominee shall be appointed as Arbitrator, and for claims exceeding Rs. 3 lacs, two gazetted Railway Officers shall be appointed by the General Manager. It also provided for supplying the vacancies, where needed.

2.6 As above, the agreement stipulates and lays down clearly that when a demand is made by

the Contractor to refer to arbitration his disputes etc., the Railway General Manager has to appoint Arbitrators for resolving the same. For this, while so appointing the Arbitrators, he has to tell them what these “disputes” i.e. the “terms of reference” are in clear terms.

2.7 Obviously, being an agreement, it requires both sides to faithfully fulfill their reciprocal promises so as to enable the Arbitrators to finally settle parties's disputes referred to arbitration as above.

2.8 The petitioner submitted that like other Agreements, once there is a “vital breach” by one party, the “agreement” becomes inoperative, and Sections 8 and 9, Arbitration Act, 1940, step in. Though, as in other Contracts, the innocent party has the option of reviving this “inoperative” agreement even after going to the Court.

2.9 When disputes arose over unpaid dues of the petitioner-contractor, he demanded same to be

referred to arbitration in terms of parties' arbitration-agreement. This was after he raised all his five claims of Rs. 7,65,929.00 (inclusive of a claim of `pre-reference' interest) and 24% running interest thereon.

FIRST REFUSAL: (C.M.A. No. 126 of 1983)

2.10 In view of the aforesaid position, the Arbitrator is requested to include all application together. However, the Railway refused the same. The Contractor thereafter addressed notice under Section 8 of the Arbitration Act, (hereinafter referred to as “the Act”) dated 22.12.1982. As the Railway failed and neglected to comply with the said notice the petitioner was constrained to file C.M.A. No. 126 of 1983 under Sections 8 and 9 of the Arbitration Act, 1940 (hereinafter referred to as “the Act), in the City Civil Court, Ahmedabad, for appointment of an Arbitrator for resolving parties' disputes.

2.11 The learned Judge, City Civil Court, Ahmedabad, by his judgement and order dated 28.12.1983 allowed the application and directed the Railway General Manager to appoint Arbitrator for resolving Contractor's disputes if the parties agree to the same.

Second Refusal (C.M.A. No. 532 of 1986)

3. As the Railway General Manager failed and neglected to act as per the aforesaid order dated 28.12.1983. Party in persion – petitioner appointed Shri R.K. Malhotra and Shri U.V. Acharya as Joint Arbitrators by letter dated 24.3.1984. However, the Railway General Manager did not act faithfully and correctly but on the contrary tried to frustrate the said order in the following aspects.

3.1 In terms of reference by the party, the Railway in paragraph No. 2, listed petitioner's five claims of Rs. 7,65,929/- but did not include the vital claim of <u>“24% of running interest”</u>

thereon, though the petitioner had raised it with his five claims. Though barred, he included counterclaim of Railway therein. Not only this, he asked the Joint Arbitrators to give reasoning leading to the award against terms of clause 63 unilaterally. The Railway therefore addressed a letter dated 24.3.1984 in this regard.

3.2 In view of the aforesaid letter of the Railway, the petitioner presumed this to be genuine and bona fide mistakes of the Railway, the petitioner himself corrected these mistakes by his two letters dated 2.4.1984 addressed to the Railway as well as the Arbitrators. The petitioner also included the left out running interest claim in his Statement of Claims dated 2.4.1984. Anyhow, the Railway General Manager refused to rectify the said defective letter of 24.3.1984 vide his reply dated 11/13-4.1984. The Railway refused to include the petitioner's claim in its written statement dated 1.2.1985.

3.3 Meanwhile Shri R.K. Malhotra declined to

act as arbitrator by his letter dated 29.4.1985 addressed to the Railway General Manager and left without in any way informing the petitioner about it. He had also clarified in his letter that they had not entered on the reference at all. Thus, for more than one year, the Joint Arbitrators did not initiate arbitration proceedings and ultimately refused to act without informing the petitioner contractor.

C.M.A. No. 532/1986

3.4 Thereafter Shri G.S. Koppikar was appointed as Umpire. As he refused to act and Railway refused to agree, the petitioner filed his second C.M.A. No. 532 of 1986 under Section 3, First Schedule, Paragraphs 3, 4 and 5 of the Arbitration Act, 1940, in the City Civil Court, Ahmedabad.

3.5 The learned City Civil Court, Ahmedabad, by his order dated 7.10.1987 directed the Railway General Manager to appoint another Joint Arbitrator to work with Shri U.V. Acharya for

resolving parties' disputes.

Third Refusal (C.M.A. No. 150 of 1992)

4. Though in light of the aforesaid order the Railway did not appoint the Arbitrator, ultimately Railway resorted to its policy of curbing arbitration at all costs.

4.1 As the Railway failed and neglected to appoint Arbitrator, the petitioner addressed a letter to the then Railway Minister Shir Fernandes by letter dated 12.4.1990 at New Delhi. Thus the Railway delayed the panel by some 2 ½ years and more.

4.2 After the aforesaid formalities are over, the Railway General Manager finally appointed Sri G.P. Garg, Chief Engineer, Western Railway, as joint Arbitrator by letter dated 29.1.1991 some six years after Shri Malhotra left. In the said letter the Railway General Manager directed the Arbitrators not to pay any claim of interest in

terms of clause 16(3) read with Supreme Court judgement in the case of Executive Engineer, Irrigation, Galimala Vs. Abnaduta Jena reported in AIR 1988 SC 1520.

4.3 The petitioner refused to accept it by letter dated 21.2.1991 sending copies to the appointees also. Anyhow the Railway refused to correct any of the illegalities.

4.4 It is the case of the petitioner that in spite of petitioner's objection the appointees fixed hearing on railway General Manager's instructions on (i) 15.7.1991; (ii) 5.8.1991 and (iii) 23.10.1991. The petitioner clarified his position by letter dated 3.7.1991, 30.7.1991 and 16.10.1991 mainly on the ground that letter of appointment dated 29.1.1991 being invalid and vitiated, the appointments were infurctuous and not binding on him.

4.5 During all these periods the petitioner went on persuading the Railway to be reasonable

and amicable and to refer his running interest claim to arbitration.

4.6 It is the case of the petitioner that during those periods, some five meetings were held between the parties from 29.1.1991 to 31.3.1992. However, the Railway refused to refer the said claim nor did it remove the other defects from its letters of appointments, with the result that the petitioner was ultimately forced to file his third successive C.M.A. No. 150 of 1992 in the Trial Court for revocation of the authority of the General Manager and for appointing Arbitrators of the Court's choice.

C.M.A. No. 150 of 1992 – Judgement dated 19.6.1996

5.1 The learned Judge, City Civil Court, Ahmedabad, heard both C.M.A. Nos. 150 of 1992 and 109 of 1992 jointly and by common judgement and order dated 19.6.1996 allowed the same, rejecting all the contentions of the Railway against it.

The learned judge, after considering the facts and circumstances of the case, has arrived at its finding of facts and law. Railway supports the judgement while the petitioner supports it fully except the order on the last page i.e. its operative part only which the petitioner seeks to challenge before this Court. The learned Judge by his aforesaid judgement and order has held in para 30 page 15 that “so looking to both the sides' contentions and arguments, it is clear that the claim of running interest as claimed by the applicant in both the proceedings were not included in terms of reference by the General Manager”. The learned Judge further held in para 31 on page 18 that “it is the main contention of the applicant that the counterclaim raised by the General Manager cannot be included in terms of reference..... I totally agree with Mr. Dhruva and decide that the said counterclaim can be claimed independently.... and not in terms of reference, and terms of reference be corrected by the General Manager accordingly”. Further in paragraph 34 on pages 21-22 the learned Judge

held that “similarly in C.M.A. No. 150 of 1992 there is a delay. In that case, delay has occurred for non-inclusion of such claim by the Railway Administration and appointment of Arbitrators of such person who do outright work for Railway Administration and against the Contractor. In that case, the Railway Administration should have acted spotingly and one of the Arbitrators of Contractor's choice should have been appointed”.

5.2 The learned Judge further observed that “so the delay occurred in that case also contributes negligence or carelessness on the part of the Railway Administration and also on the part of the contractor who have not agreed many times for the names suggested”. It is further observed that “the delay occurred in finalizing the dispute of the Contractor, itself is a ground which induces me to revoke the authority of the Railway Administration to appoint Arbitrators. The learned Judge has further observed that the said delay also

restricts me not to act in this fashion but it will further cause delay by way of appeals and revision etc., above my order. So, relying on the sound intelligence of Railway Administration and General Manager, I am of the opinion that one more opportunity should be given to Railway Administration to appoint the Arbitrators as per terms of agreement and dispute raised by the Contractor be referred to Arbitrator. I hope the Railway Administration will work and act spotingly and in right earnest spirit in finalizing the dispute of the Contractor which has remained unattended or unsettled for a period of more than 12 years. If such an award is passed before 12 years, I hope the Contractor would have doubled or made four times the amount by this time.

5.3 The learned Judge further observed that with these remarks, though there is a delay, I am of the view that the revocation of the authority of the Railway Administration or General Manager is not necessary to be made at this stage.

5.4 In para 35 on pages 22-23 the learned Judge has further observed that “I must mention at this stage that many authorities were cited by Mr. Dhruva for revocation of the authorities of the Railway Administration. Just my attention was drawn to the case reported in 1993(1) ALR page 469 (viz. Nandyal Co-op. Spinning Mills Vs. K.V. Mohan Rao), AIR 1994 SC page 2381 (viz. G.R. Reddy & Co. Vs. CE, Madras, MES) and other ruling cited. The learned Judge has further held that “I have no two opinion about the principle laid down in the said judgement cited by Mr. Dhruv and I am bound to follow the said principles. In ths particular case, I am of the view that the disputes and claims of the Contractor be quickly settled by the Railway Administration then at the lapse of 13 or 14 years, the Contractor will get the fruits of his claim. With this noble idea, I am not passing the order to revoke the said authority of the Railway Administration. With this remark, I pass the following final order and reply the points raised by me accordingly.

5.5 “Order – The General Manager of Railway administration should appoint the Arbitrators to resolve the disputes and differences arose by the Contractor.....”

6. Being aggrieved by and dissatisfied with the said order, the petitioner has originally filed Civil Revision Application under Section 155 of the CPC but now converted into Special Civil Application and the petitioner has raised the following contentions before this Court:

PETITIONER'S SUBMISSIONS:

6.1 The petitioner states that Railway General Manager refused to refer Contractor's running interest claim from 1982 to 1996 (date of trial Court Judgement) in spite of repeated Court-Orders, contending before the trial Court that as Clause 16 of the Contract barred payment of interest, the Railway General Manager had powers to refuse to refer the same. This, in

spite of the fact that he did refer claim of pre-reference interest in the same defective letters of appointment dated 24.3.1984 and 29.1.1991.

6.2 Petitioner further submits that the petitioner craves leave to mainly rely on the impugned judgement itself so far as the appointment of Arbitrator consequent upon the Arbitration Act.

6.3 The petitioner submits that so far as the judgement of the learned trial Judge is concerned, neither there is any error of facts nor of law, is committed. here. Both sides accept this fully. The Court has given directives to Railway (i) to refer all the claims, including running interest, to arbitration; (ii) to delete Railway's counter claim from terms of reference. (iii) not to issue any unilateral instructions to the Arbitrators' appointed (on interest etc.) vindicating petitioner's stand. The said findings are in favour of the petitioner which the petitioner contended before the learned trial

Judge. However the petitioner has stated that in spite of the aforesaid order passed by the trial Court, after referring to the judgement of the Hon'ble Apex Court which is binding on him, wherein in para 35 the learned Judge has relied on the judgement of the Hon'ble Apex Court which was cited by the petitioner. However, after following the said judgement, the learned Judge has observed that he has no two opinions about the principle laid down therein and that he was bound to follow the said principles. As such he had no option but to act in terms of these principles for revoking the authority of Railway General Manager. However, in spite of the aforesaid observation, the learned Judge refused to revoke, giving reasons in para 34 of the judgement, as stated above:

THE PETITIONER MADE THE FOLLOWING SUBMISSIONS:

6.4 The petitioner therefore submitted that the learned Judge has clearly erred in passing this part of the order and the learned Judge has

passed this order without jurisdiction. The learned Judge at one breath states that he is bound to revoke the authority of railway, he should not have committed this dereliction of duty and further instructions which have been referred to in para 34 of the order which I have referred to earlier.

6.5 The petitioner, therefore, submitted that the aforesaid directions still work with a great injustice to the petitioner and prayed that justice would be served only if railway officers are not appointed as Arbitrators because according to him a very hostile and bitter atmosphere prevails against the petitioner in the railway office. His recent visits to Headquarter Office, Bombay during December, 1994 has made this very clear and as such he has prayed that this Court may be pleased to quash and set aside the directions given by the trial Court and no Railway Officer be appointed as Arbitrator. The aforesaid aspect has been stated by the applicant by his application dated 26.12.1994 before the

learned Judge.

6.6 Before the learned trial Judge the petitioner cited several authorities and the ratio and the principles of the authorities cited by the petitioner clearly stipulate that once the Railway General Manager refused to act to refer Contractor's claims to proper arbitration, and continued to refuse to fulfill faithfully his part of the arbitration-agreement, he had forfeited his authority to appoint Arbitrators in terms of the arbitration agreement, which had ceased to exist and become inoperative on his final refusal.

6.7 The petitioner further submitted that in view of the authorities cited by the petitioner before the learned trial Judge for which I will make a reference afterwards, he submitted that the Court should have appointed the Arbitrator without fail and once again giving one more chance to Railway, it directed the Railway General Manager to appoint Arbitrators. The said

judgements of the Hon'ble Supreme Court have been cited before the trial Court.

6.8 The petitioner has therefore submitted that the learned trial Judge has directed the Railway to appoint Arbitrators. The said direction is without jurisdiction because the Railway General Manager has forfeited his authority under Section 8 of the Arbitration Act. The petitioner submitted that the learned Judge ought not to have passed his order because under Section 8 the Court has power to appoint the Arbitrators. When the Court directed the Railway to appoint Arbitrators but earlier Railway failed and neglected to appoint Arbitrators for a long time, the learned Judge has completely misinterpreted provisions of Section 8 of the Arbitration Act and other authorities cited before him. The effect of the directions given by the learned Judge is that dead and non-existent arbitration agreement is revived and the Contractor is thus being compelled to enter into a contract against his strong refusals.

6.9 The petitioner craves leave to refer to and rely on the judgement of the Civil Revision Application No. 669 of 1990 in the matter of H.K. Dhruva Vs. Union of India which was decided by this Court on 2.3.2001. In that matter this Court (Coram: K.M. Mehta, J) in para 11 of the judgement was pleased to pass the following order:

6.10 "In the facts and circumstances of the case and in view of he foregoing discussions made hereinabove, this Civil Revision Application deserves to be allowed and it is accordingly allowed. The judgement and order dated 6th November, 1989, passed by the learned City Civil Judge, Ahmedabad, in Civil Misc. Application No. 384/86 is quashed and set aside. I, therefore, appoint Shri S.S. Mathur, Arbitrator to resolve the disputes raised in Civil Misc. Application No. 384/86. However, for some

eventuality if he is not available, then I appoint Shri T.B. Joshi (Retd.) Deputy Chief Engineer, Western Railway, Vadodara, to act as Arbitrator. If any reason, if Shri T.B. Joshi (Retd.) Dy. Chief Engineer, Western Railway, Vadodara, is not able to act as Arbitrator then alternatively Shri H.G. Patel, Retd. Dy. Chief Engineer, Churchgate, may also be appointed as Arbitrator. I hope and trust that the Arbitrator so appointed should complete the arbitration as early as possible, within 4 (four) months from the date of receipt of writ of this Court. The applicant and respondents are requested to contact Shri S.S. Mathur and submit to him their claims and replies thereto within first two months and parties should provide fees to Shri Mathur in equal share. A copy of this order be served to Western Railway who in turn, to serve on Shri S.S. Mathur. However, if

Shri S.S. Mathur is not available or if he refuses then Railway should request Shri T.B. Joshi, who is appointed as Arbitrator when Mr. Mathur is not able to do the work. Rule is made absolute to the aforesaid extent".

6.11 Similarly, in Civil Revision Application No. 670 of 1990 in the case of H.K. Dhruva Vs. Union of India this Court (Coram: K.M. Mehta, J) by order dated 10.4.2001 was pleased to allow the Revision Application and in paragraph No. 11 this Court has observed as under:

6.12 "In the facts and circumstances of the case and in view of the foregoing discussions made herein above, this Civil Revision Application deserves to be allowed. The judgement and order dated 6th November, 1989, passed by the learned City Civil Judge, Ahmedabad, in Civil Misc. Appln. No. 385/86 is quashed and set aside. I, therefore, appoint Shri

T.B. Joshi, Retired Deputy Chief Engineer, Western Railway, Vadodara, as Arbitrator to resolve the disputes raised in Civil Misc. Application No. 385/86. If by any reason, if Shri T.B. Joshi, (Retd.) Deputy Chief Engineer, Western Railway, Vadodara, is not available to act as Arbitrator then alternatively Shir H.G. Patel, Retd. Deputy Chief Engineer, Churchgate, may also be appointed as Arbitrator. I hope and trust that the Arbitrator so appointed should complete the arbitration as early as possible within 4 (four) months from the date of receipt of writ of this Court. The applicant and respondents are requested to contact T.B. Joshi and submit to him their claims and replies thereto within first two months and parties should provide fees to Shri T.B. Joshi in equal share. A copy of this order be served to Western Railway who in turn to serve on Shri T.B. Joshi. However, if Shri T.B.

Joshi is not available or if he refuses then Railway should request Shri H.G. Patel, who is appointed as Arbitrator when Mr. Joshi is not able to do the work. Rule is made absolute to the aforesaid extent. Mr. Dhruva, also allowed service to Shri T.B. Joshi."

6.13 In another Revision Application No. 671 of 1990 between the same parties this Court on 20.4.2001 was pleased to pass order more or less as passed in C.R.A. No. 670 of 1990. In paragraph No. 11 this Court gave certain directions.

6.14 Being aggrieved by and dissatisfied with the said order of this Court, Railway filed S.L.P. before the Hon'ble Supreme Court being Civil Appeal No. 600 of 2003. The Hon'ble Supreme Court by order dated 28.7.2004, after considering the facts and circumstances of the case, was pleased to observe on page 2 as under:

6.15 "Having heard the learned senior counsel

for the appellant as also the respondent appearing in person, we are satisfied that no fault can be found with the view taken by the High Court. In order to attract applicability of the bar enacted by Order 2 Rule 2, CPC, it is necessary that the cause of action on which the subsequent claim is founded should have arisen to the claimant when he ought for enforcement of the first claim before any court. On the facts found and as recorded in the judgement of the High Court and with which we find no reason to differ, the second demand raised by the respondent was not available to be made a part of the claim raised in the first application. The bar enacted by Order 2 Rule 2, CPC, is clearly not attracted."

6.16 The petitioner, therefore submitted that in view of the aforesaid three judgements of this Court which have been confirmed by the Hon'ble Supreme Court, the principle of Section 11 of CPC

– Res judicata, now at this stage, bars the respondent Railway to raise the same issue again and contest petitioner's plea of appointing independent Arbitrator of the choice of this Court. It may be stated that the main contentions of the petitioner are upheld by the trial Court and accepted by Railway by not challenging the same.

7. It may be noted that in this case Railway has filed affidavit of one Ashokkumar Tiwari, Executive Engineer (C), Ahmedabad on 2.3.2005. The petitioner has filed rejoinder to the same on 14.9.2005.

7.1 Thereafter the matter was heard at length. Initially, the petitioner filed written submissions. Thereafter, the railway filed written submissions. Thereafter, again the petitioner filed the rejoinder. The railway also filed sur-rejoinder and the petitioner also thereafter clarified certain points where the railway has filed rejoinder and railway

thereafter filed further submissions. I have considered all these submissions and dealt with the matter at this stage.

7.2 Against the above background of facts, this Court now examine the main questions of law raised by the petitioner against the trial Court judgement by this application. In para 4 page 4 of the application the petitioner stated that the Court accepted all the major contentions, but refused to grant the prayers of the petitioner and instead of removing the General Manager, it gave one more opportunity to the General Manager for appointing arbitrators, by order dated 19.6.1996, now under challenge here. In para 5, page 5, he stated the most critical questions being can a learned Judge go against the law, as laid down by the Hon'ble Supreme Court knowingly while accepting fully the principles and directives laid down in the authorities cited by the petitioner? And yet refuse to follow the same willfully? These are the compelling points to be decided here mainly and exclusively.

7.3 The petitioner submits that the jurisdiction vested in it by law has to be exercised by a trial Court within its strictest limits. Also it cannot exercise jurisdiction which it does not possess. And if it errs the Court has to step in it to set right the errors under Article 227 of the Constitution. (AIR 1968 SC 1487: State of Gujarat Vs. V.V. Vaghela; AIR 1958 SC 398 Nagendra N. Vs. Commsr. Hills Div.; AIR 1954 SC 215 Waryam Singh V. Amarnath.

7.4 The petitioner refers to para 35 of the impugned judgement, which is “...35. I must mention at this stage that many authorities were cited by Mr. Dhruv for revocation of the authorities of the railway administration ....” And what are these authorities of the Supreme Court? These are – (1) It, therefore, follows that in a case where the arbitration clause provides for appointment of a sole arbitrator and he has refused to act then the agreement clause stands exhausted. And it is for the Court to

intervene and appoint another arbitrator under Section 8(1)(b), if arbitration agreement does not show that it was intended that the vacancy shall not be supplied. That is the agreement should debar any further arbitration. (para 5 page 203). (State of West Bengal Vs. National Builders AIR 1994 SC 200). (2) If the Administrative Head neglects to appoint arbitrator within 15 days of the notice, he abdicates his authority to appoint one, and the Court gets the jurisdiction to appoint under Section 8(1)(a) (para 10 page 473) (Nandyal Spinning Mills Vs. K.V. Mohan Rao ARB. L.R. 1993(1) p. 469 SC). (3) Thus when the notice was given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract. Notice was an intimation to the opposite party to act upon the terms of the contract and his/its non-availment entails the forfeiture of the power to appoint an arbitrator in terms of the contract and gives right to the

other party to invoke the Court's jurisdiction. (para 6 page 2383) G.R. Reddy Vs. Chief Engineer, MES, Madras AIR 1994 SC 2381.

7.5 Referring to these authorities the learned Judge stated further in his para 35, that “just my attention was drawn to the case in 1993(1) ALR page 469, AIR 1994 SC page 2381 and other ruling cited. I have no two opinion about the principle laid down in the said judgement cited by Mr. Dhruva and I am bound to follow the said principles”. In this particular case, I am of the view that the disputes and claim of the contractor be quickly settled by the railway Administration then at the lapse of 13 or 14 years period, the contractor will get the fruits of his claim. With this noble idea I am not passing the order to revoke the said authority of the railway Administration. With this remarks, I pass the following final order..”

7.6 The petitioner has strongly argued that above precedents, laying down the law declared by

the Supreme Court were accepted to be binding to him by the learned Judge. And so, he had no option but to act in terms of these principles for revoking the authority of the railway General Manager.

7.7 So, the reason for not following the law declared by the Hon'ble Supreme Court in terms of Article 141 of the Constitution is solely the apprehension of appeals, Revision etc. by railway and the resultant fear of further delay in this abnormally delayed matter, as stated by the learned Judge himself. This had prompted him to state in para 35, page 23, that with this noble idea I am not passing the order to revoke the authority of the railway. Unfortunately, this was a very serious mistake on his part. Whatever the inducement, a Court has to act in the parameters of its jurisdiction and no reasons unless based on law, should compel it to deviate from the duty it was required to perform. As such, after accepting that he was bound to revoke railway's authority, he should not have committed this

dereliction of duty, which Article 141 had bestowed upon it.

7.8 Finally, the petitioner argued that the ratio and principles of the authorities cited by him clearly stipulates that once the railway General Manager refused to act to refer contractor's claims to proper arbitration, and continued to refuse to faithfully fulfill his part of the arbitration-agreement, he had forfeited his authority to appoint arbitrators in terms of the arbitration-agreement, which had ceased to exist and become inoperative on his final refusal. And this authority was then vested in the trial Court to be exercised in terms of its jurisdiction only. No two views were available to be considered and exercised as stated by the learned Judge himself in para 35 of his judgement. As such, the learned Judge should have appointed arbitrators of his choice to resolve contractor's disputes. Law required him to exercise this jurisdiction accrued to him as above in terms of Section 8 of the Act, 1940

without delay. Also the trial Judge should not have conferred upon the defaulter railway's General Manager the authority of which he was already deprived of, after its forfeiture in terms of Section 8 of the Arbitration Act, 1940. Moreover, once railway General Manager's authority was forfeited and statutory jurisdiction accrued to the Court, the learned Judge was barred from delegating his jurisdiction to a defaulter, especially when this defaulter had been blocking arbitration for almost quarter of a century.

7.9 Moreover, the learned Judge again went against the Constitution of India. He delegated his authority to the railway, thereby reviving the dead and non-existent arbitration agreement. Thus, the contractor is being compelled to enter into a contract against his strong refusal. The learned Judge should have remembered that no law in India exists for this exercise.

7.10 The petitioner argued mainly that a Court

may use discretion only when on a given point of law, it arrives at more than one view. But in matters where no two views exist, the Court has simply to go by the law.

7.11 The railway has committed this lapse intentionally and knowingly, steadfastly defying Court orders and the law for years and years. And law nowhere allows a “habitual defaulter” to benefit from his own default. The respondent has failed to produce a single authority in support of any of its contentions, anywhere. When applied to Court of justice, discretion means sound discretion guided by law. It must be governed by rule not by humour, it must not be arbitrary, vague and fanciful but legal and regular. (AIR 1981 SC 2085; Ramji D. Vs. Invest Import). Railway's reliance on “clause 64” cannot help it, as in these cases, no such “clause 64” is found to exist and apply. As such, it cannot apply here anywhere.

7.12 It is to be held that once the trial

Court accepted the ratio and the principles of various Hon'ble Supreme Court authorities cited by the petitioner, he had no option except to revoke the authority of the railway General Manager and to appoint arbitrators of the Court's choice.

7.13 Law nowhere bestows upon him the power to use his discretion in these matters. And also there is no legal provision under which he could transfer and delegate his own statutory jurisdiction to the respondent.

7.14 As the respondent railway has not only defaulted in these matters but it has stuck to these defaults continuously for some 25 long years and in the process has inflicted heavy expenses and utmost hardships to the petitioner who is made to stand before one Court after another, in his search for justice in these matters for past quarter of a century. The petitioner has also vehemently relied upon a 1978 Supreme Court judgement to strongly point out

that conciliation and not confrontation should always be railway's litigative policy as cited below: “We like to emphasize that Governments must be made accountable by Parliamentary Social audit for wasteful litigative expenditure inflicted on the community by inaction. A litigative policy for the State involves settlement of Governmental disputes with citizens in a sense of conciliation rather in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in Court. We are constrained to make these observations because much of the litigation in which Governments are involved adds to the case load accumulation in Courts for which there is public criticism. It is stated that a more responsive spirit will be brought to bear upon Governmental litigation so as to avoid waste of public money and promote expeditious work in courts of cases which deserve to be attended to. **(**AIR 1978 SC 1603: State of Punjab Vs. Geeta Iron & Brass Works)

7.15 It is most unfortunate that, even after more than twenty eight years of passing above directives, the Central Government and its railway Administration seem determined to go on flouting the above sacrosanct directives.

7.16 The petitioner accordingly prayed that this Court may allow and the order dated 19.6.1996 of the trial Court in both these applications deserve to be quashed and set aside. The petitioner's prayers for revoking the railway General Manager's authority and for appointing arbitrators of this Court's choice, therefore, requires to be granted in terms of the law declared by the Hon'ble Supreme Court as per Article 141 of the Constitution of India.

7.17 Accordingly, Sri J.S. Gehlot, retd. C.E., W. Railway may be appointed as Sole Arbitrator in this matter from the suggested list of names submitted.

SCA No. 1176 of 2006

7.18 Same arguments as submitted above apply to this also and the same earlier prayers in CMA No. 109 of 1992 may be granted accordingly.

7.19 Sri C.R. Kalsi, retired General Manager, Indian Railways may be appointed accordingly as a sole Arbitrator.

Railways Reply:

8.1 Mr. Mukesh Patel, learned advocate for the Railway has made the following submissions. He has submitted that in both the matters initially applications for appointment of the Arbitrator have been filed and the panel of Arbitrators was appointed by the General Manager, Western Railway as per the order passed by this Court and the said proposition is accepted when the first time order came to be passed directing the General Manager, Western Railway to appoint the Arbitrator. In pursuance of the first order, the Arbitral Tribunal was appointed. Because of

some difficulties, inconvenience, the arbitrators expressed their inability in respective proceedings. Then the scope of change of the names of the Arbitrators arose.

8.2 Instead of filing application for the same, the applicant filed applications for appointment of Arbitrators afresh as if it is a fresh proceeding taking contrary stand contending that it is a failure on the part of the respondent – Railway Administration to appoint the Arbitrator and to treat it as forfeiture of right of the General Manager and thereby to appoint the private Arbitrator as such, when in the first application the arbitral panel had been appointed and the proposition as well as the order passed therein had been accepted, by filing another application at later stage contending the failure is not tenable. And otherwise also, the terms and conditions of the contract cannot be ignored. There is specific provision made in the Arbitral Clause itself which cannot be bypassed.

8.3 The learned advocate has further submitted that in both these matters the learned Judge directed the general Manager, Western Railway to appoint the Arbitrators afresh and in pursuance thereof, twice the arbitral panel was constituted. But the petitioner has not preferred to participate in the arbitral proceedings and has not allowed to proceed further and against the order passed by the trial Court, the aforesaid petitions have been filed.

8.4 In both the matters, it is the question as to whether by way of the present proceedings on the issue of appointment of Arbitrator, discretion exercised by the trial Court upon considering the overall facts of the case, conditions of the contract and the provisions of the law as well as the factual aspect as well as the attitude of the parties to the proceedings, the decision taken in discretion and inherent jurisdiction by the trial Court would be permissible to challenge just for the reasons

that what is demanded by the petitioner is not granted.

8.5 The learned advocate submitted that so far as Special Civil Application No. 11384 of 2004 is concerned, the same is permitted to be converted from Civil Revision Application No. 584 of 1997, as during the pendency of the C.R.A. there was change in the Civil Procedure Code. As such two proceedings in the form of converted Special Civil Application would not be maintainable as what was under challenge in Civil Revision Application was the final order and not the interim order. So far as Special Civil Application No. 1176 of 2006 is concerned, the same is arising from original Civil Revision Application No. 322 of 1997. The said C.R.A. No. 322 of 1997 had been disposed of by this Court. As against that, the Review Application appears to have been filed and the said Review Application also had been rejected. Unless and until the scope of filing Special Civil Application is kept open or permission is granted

by the said order, for the same reason proceedings in the form of Special Civil Application would not be tenable. In the circumstances even Special Civil Application No. 1176 of 2006 also would not be maintainable.

8.6 The learned advocate further submitted that in addition of the aforesaid grounds, it is further stated that this is the matter arising from the order passed with regard to the appointment of Arbitrator and as per the law laid down in the cases of M/s. S.B.P. & Co. Vs. M/s. Patel Engineering & Ors., the proceedings under challenge under Article 226 of the Constitution is not maintainable by way of writ petition and the remedy lies before the Hon'ble Apex Court only. Since both these proceedings are filed under the provisions of Article 226 of the Constitution of India and with regard to the matter of appointment of the Arbitrator, the present petition before this Court under Articles 226 and 227 of the Constitution is not maintainable.

8.7 The learned advocate further submitted that in both the proceedings, initially the arbitral Tribunal had been constituted in pursuance of the order passed by the trial Court and the proceedings had started. At that time the petitioner had not challenged the said order and accordingly had accepted the proposition. It was never the say of the petitioner at the relevant time that the respondent Railway Administration has failed and neglected to appoint the Arbitrator and the right is forfeited. Even if there would have been the contention likewise at the relevant time, once the General Manager was directed to appoint the Arbitrator and the Arbitral Tribunal was constituted by appointing the Arbitrator and the same was accepted, the petitioner is estopped from raising the contention at belated stage about failure and forfeiture of the right to appoint the Arbitrator. Rather, it would be amount to waiver of all the contentions.

8.8 The learned advocate further submitted that as indicated in the affidavit in reply filed in Special Civil Application No. 11384 of 2004, after resumption of the arbitral proceedings, the petitioner sought to create complications by raising technical points and insisted for addition of certain claims. The said issues could have been very well raised before the Arbitral Tribunal and the Arbitral Tribunal could have decided it.

8.9 It was further submitted that thereafter the Arbitrators appointed because of their personal inconvenience or their personal inability, expressed unwillingness to continue with the arbitral proceedings, it was only a matter of replacement of Arbitrator and for that appropriate application for modification of the constitution of Arbitral Tribunal could have been made.

8.10 Instead of that, a fresh application came to be made by the petitioner, as if there were no

orders earlier. As such, filing of such application, namely, C.M.A. No. 150 of 1992 and 109 of 1992, itself were not maintainable in the eye of law. Still, however, as the trial Court had passed an order directing the General Manager, Western Railway to appoint the Arbitrator and at that time all the relevant factors had been taken into consideration by the learned trial Judge and rightly exercised discretion vested in him. Some observations made cannot be considered or interpreted to negative or nullify the decisions rendered by the trial Court in its discretion, as sought to be expressed by the petitioner in the present proceedings.

9. The learned counsel submitted that before dealing with what is argued and submitted by the petitioner in both the petitions, the respondent submits as under:

9(i) Both the proceedings had been started under the provisions of Arbitration act

1940 and the relevant clause that is Arbitration Clause i.e. Clause 62 and 63 at the relevant time, which had been resorted by the petitioner, are now the Arbitration Clause 63 & 64 and the wordings thereof are the same.

9(ii) It is settled law that while resorting arbitration clause, the conditions of the Contract, stipulations therein and the requisites of the conditions of the contract are to be given due regard and the same cannot be ignored. So far as the procedure to follow and right to claim the appointment of Arbitrator is concerned, no comment is offered at that stage, as the said stage is already passed when the trial Court passed the order directing the General Manager, Western Railway to appoint the Arbitrator. Therefore, the question remained when the discretion exercised by the trial Court is questioned as to what

should be the constitution of the Arbitral Tribunal and what would be the qualification of the person to be appointed as Arbitrator. According to old clause 63 (new clause 64) of general Conditions of the Contract, Arbitration Clause provides about the sole power of appointing the Arbitrator lies with the General Manager, Western Railway and when the claim is more than the particular amount, the constitution of the Tribunal would be two Arbitrators and one Umpire and the persons so as to be appointed as Arbitrator forming Arbitral Tribunal would be the serving Railway Gazetted Officer. In this case, the person who was insisted to be appointed as Arbitrator was not a serving Railway Gazetted Officer.

9(iii) The learned counsel submitted that after the order passed by the trial Court, the General Manager, Western Railway, has

already appointed Arbitrator but the petitioner insisted for the appointment of the particular person as Arbitrator, which was not possible otherwise, as the said person had been already appointed as Presiding Officer.

9(iv) The learned advocate has further submitted that the petitioner has sought to contend that it was a failure of the Railway Administration but the same contention is not tenable, as the initial order passed by the trial Court and constitution of the Arbitral Tribunal was not disputed and it amounts to action of approbating and reprobating by the petitioner. Even otherwise, it is also the settled law that because of some circumstances or under bona fide genuine impression, if the Arbitrator is not appointed, it would not amount to failure in exercise of power to appoint the Arbitrator and such unexercise of powers

by the General Manager would not lead to forfeiture of right of the General Manager to appoint the Arbitrator. In this regard, the respondent relied upon the following judgements:

9(v) UOI Vs. M.P. Gupta reported in 2004 (10) SCC 504:

In the said case, the appointment of Sole Arbitrator is set aside as the Agreement specifically provided for appointment of two Gazetted Railway Officers of equal status as Arbitrators. The same provision applies here. In the said judgement, reference of clause 64 – demand for Arbitrator is made. In the present case, the same provision with the same wordings were there in Clause 63 (accordingly, there is only the change in number of the clause and not the provisions made in the Arbitration clause).

9(vi) Government of Andhra Pradesh Vs. Mastan Rao reported in AIR 1994 SC 490 :

In the said case also appointment of Sole Arbitrator, removal of the panel and appointment is aside and the judgement has been followed in terms, as the conditions of the contract are to be given due regard.

9(vii) A. Mohammad Yunus Vs. FCI reported in 2000(2) Arbi. L.R. 2 wherein also it is held that when there is a specifc term with regard to the appointment of Arbitrator and the appointment of Arbitrator is not made in the prescribed manner, the arbitral proceedings could not have taken contrary to the agreed stipulations. Rather in that case the award made by the Arbitral Tribunal constituted contrary to the agreed stipulations was set aside holding that the award was by Coram Nonjudice.

9(viii) NTPC Ltd. Vs. Raghul Construction reported in 2005(2) Arb. L.R. 606 -

In the said case it has been held that when the arbitration agreement itself is a contract and parties entered into solemn agreement agreeing on procedure for appointing the Arbitrator, the same fact that a party has failed to follw that agreed procedure does not mean that the Chief Justice or the designated person shall not take any measure to give effect to the agreed procedure. Accordingly, the trial Court has not committed any error in exercising the discretion on perusal of the overall facts and circumstances of the case, by giving due regard to the provisions of the arbitral clause. It is held that endeavour must be given to affect the arbitration clause and in case of failures thereafter, the action of forfeiture may take place. As stated

above, in this case, at the initial stage also there was appointment of arbitrator and the said proceedings, order of trial Court in those applications and the arbitral proceedings were accepted and even after the order passed by the trial Court which are under challenge, immediately the General Manager has acted upon by appointing the Arbitrators. Thus, in crux, it is the law that even in the case of failures, the endeavour must be given to affect the conditions of the contract and for that exercise of discretion by the trial Court cannot be said to be unreasonable or contrary to law. It appears that the petitioner is not interested in proceeding with the arbitral proceedings in free atmosphere, as reflects from the insistence of the petitioner for appointment of a particular person as Arbitrator.

9.1 If the petitioner would have co-operated and participated in the appointed Arbitral Panel in pursuance of the order passed by the trial Court under challenge here, by the time the arbitral proceedings would have been completed. But such completion is prolonged at the instance of technical plea and long rope drawn by the petitioner. The resultant effect is that ultimately under the name of one claim or another, the public money would be adversely affected. No such tactics could be permitted that too at the instance of the person proposes to operate the arbitral clause under the approach given by the petitioner.

9.2 The learned counsel has relied of Shetty Construction Vs. Konkan Railway reported 1999(8) SCC 604: By the said judgement it is held “It could not be said that the respondent authorities have failed to carry out their corresponding contractual obligations under the very same clause and therefore had forfeited their right to the machinery of arbitration under the terms of

the contract and consequently it was open to the Court to appoint the independent individual arbitrator. In the said case the aspect with regard to the failure has been examined. When the party is under bona fide impression and it would not be deliberate avoidance of exercise of power, it cannot be contended that it was a failure in exercise of powers. No doubt, this very case is relied upon by the petitioner, alleging that the right of the general Manager is liable to be forfeited and the Court can appoint the private arbitrator. The said contention is not tenable, as bot these cases are not falling within the meaning of failure, as mentioned above, more particularly when at initial stage also there was appointment of Arbitral Tribunal for the same contract work and the arbitrator appointed by the General Manager has been accepted, then contending failure and thereby forfeiture, those issues have no place in this case and therefore, the analogy sought to be put forward by the petitioner qua the ratio laid down in the present case is not tenable. Rather what is made clear by

the said judgement that due regard is to be given to the conditions of the contract.

9.3 The learned counsel has further relied on the decision in the case of GROUPE CHIMIQUE TUNISIENSEA VS. SOUTHER PETROCHEMICASL reported in 2006(5) SCC 275. In the said case, it has been held that if on account of mistake or wrong understanding of law, a party takes a particular stand, he is not barred from changing his stand. It has been further held that the party concerned being found to be under bona fide intention that there cannot be arbitration and nominating Arbitrator, such position would not be considered as failure resulting into the forfeiture of the right. Accordingly also, what is sought to be contended by the petitioner about failure and forfeiture of right of the General Manager relying upon the cases reported in AIR 1994 SC 238 and others is not tenable in the eye of law.

9.4 The learned advocate further submitted that so far as the judgement relied upon by the

petitioner i.e. 1998 SC 238, 1993(1) Arb. L.R. 469 etc., are concerned, the facts of the said cases are different. It was the cases where at initial stage the arbitrator was not appointed, there was no stipulations in the conditions of the contract likewise in the present case and the proceedings took place, as mentioned above, has not taken place. As mentioned hereinabove, the endeavour must be made to operate the conditions of the contract and stipulations thereof. It is not the case here where there is absolute failure. In the initial application, the General Manager was directed to appoint the Arbitral Tribunal and the Arbitral Tribunal had been constituted and the said judgement was accepted by the petitioner, then initiation of further proceedings thereafter would not lead to the meaning of failure to appoint Arbitrator and there cannot be consequences of forfeiture of right to appoint Arbitrator as sought to be narrated by the petitioner. Rather filing of C.M.A. No. 150 of 1992 and 109 of 1992 was barred by the principle of res judicata and the

principle of estoppal.

9.5 The learned advocate further submitted that what is stated by the petitioner in the final argument dated 10.12.2006, has, as such no relevance and the interpretation sought to be expressed has no stand. The proceedings has been prolonged and delayed due to adamant and sticky approach on the part of the petitioner himself. Otherwise, the General Manager had, in compliance with the order of the trial Court, which is under challenge, already appointed the arbitrators and if, by adopting the objective and positive view, the petitioner would have participated in the arbitral proceedings and co-operated, there would not have been such a delay. Accordingly, it is not open for the petitioner to raise such contention of delay, to gain equity and sympathy before the Court.

9.6 The petitioner himself admits about the consideration of all the issues and rival contentions of the parties, by the trial Court

and in that case, selecting a few lines which have been stated in the order, the petitioner attempts to make out the ground to render the judgement invalid. As such, the judgement of the trial Court cannot be interpreted, read or understood or its validity cannot be tested by reading a bare word. But it has to be seen and considered from the objectives, reasonings, circumstances etc., also for arriving at the conclusion and entering into the exercise of discretionary power for final holding. As such, the subject matter of exercise of discretion of overall scrutiny of the facts on record has a very limited scope. What is sought to be contended has no place for consideration at such a belated stage. No doubt, the law laid down by the Courts are binding, but while applying the ratio laid down in the cases of Western rAilway Vs. National Builders and G.S. Reddy & Co. Vs. Chief Engineer and Nandyal Co-operative Spg. Mills Ltd. Vs. K.V. Mohan Rao, the facts of the respective cases are required to be compared. As can be seen from the respective judgements cited

and the facts of both the petitions, the same does not appear to be similar and the area of consideration of the respective cited judgements were altogether different than the present two petitions and hence by selecting some of the lines of the said judgements, it cannot be said that the said judgements are binding. None of the said judgements excludes the exercising of the discretionary powers by the trial Court while deciding the arbitration petitions, in a peculiar facts and circumstances. Rather, all those issues had been over when the first time the General Manager was directed to appoint the Arbitrators and the Arbitrators had been appointed and the said position had been accepted by the petitioner himself. Thereafter, the petitioner filed another petition wrongfully, in which the present order has been passed. Considering the glaring differences of facts of these two petition and the cases cited/relied upon by the petitioner, the ratio laid down thereby would not apply in the present cases. As there is no failure, there is no question of assuming forfeiture of the

authority of the General Manager.

9.7 The learned advocate further submitted that the petitioner has sought to rely upon the judgements delivered by this Court but in the said cases also it was the question of appointment of Arbitrator at initial stage and there was no such facts like of the present petition. In the said case, there was no order of appointment of Arbitrators at all at earlier occasion and there was no order passed by the trial Court in exercise of its discretion. Thus, the subject matter before this Court in the said petitions was altogether different. In the present cases, there was no refusal to appoint the Arbitrator, as sought to be expressed. The trial Court has justified by giving the reasoning for exercising the discretion and those observations cannot be allowed to be interpreted or express against the railway administration in different manner.

9.8 The learned advocate further submitted

that though the railway administration has come forward and acted upon the orders passed and there were all scopes to proceed with arbitral proceedings and there were consistent suggestions of the names of the arbitrators, due to sticky, negative and non-cooperative approach, the arbitration proceedings in both the matters could not be proceeded further and a long time has been passed due to non-participating and non-cooperation from the end of the petitioner himself. This situation has not only caused possible burden of recurring interest on the amount claimed but has further caused pendency of litigation for no reason and kept the railway administration busy in the proceedings. No person can be allowed to sit over for a long time and take benefit of his own failure, inactiveness or non-cooperative approach, otherwise it would amount to giving premium to a wrongdoer and ultimately, the public fund and the public cause would be adversely affected.

9.9 The learned advocate submitted that as

mentioned above, as such, there was neither failure nor a negative action on the part of railway administration and what was expected by the petitioner was contrary to his own acceptance of the position and the conditions of the contract itself. Not only that the learned trial Judge, considering all aspects has exercised his discretion judiciously which does not call for any interference at the hands of the Court and the petition deserves to be rejected with costs.

9.10 The learned advocate for railway submitted that with regard to discretion exercised by the trial Court is concerned, it is submitted that the same has been duly and properly exercised. What is sought to be expressed by the petitioner quoting some observations, would not nullify the jurisdiction exercised by the trial Court.

9.11 Further it is a matter arising from contract and the remedy sought is under Arbitration Law. The Arbitration Act and the law

settled is that the due regard is to be given to the conditions of contract. In this case the arbitral panel has been appointed may a times. Initially, there were proceedings and the arbitrators were appointed and still however, for one reason or another, the petitioner files another petition for appointment of arbitrator which was otherwise not maintainable. After the impugned order the railway administrator has appointed arbitrator but the petitioner has not agreed for that and prolonged the issue by filing further proceeding. Consider the overall facts and circumstances the trial Court has passed the order.

9.12 Regarding judgement reported in 1994 AIR SC 2381 in the case of G. Ramachandra Reddy & Co. In the said judgement it is held that “the Court should endeavour that contract should always be effected though the contracting party failed to act according to contract. In this case, in the contract the arbitration clause 63 provides about procedure, norms and qualification of the

arbitrator to be appointed. As per the said clause the arbitrator to be appointed should be railway gazetted officer and the General Manager is competent authority. The compliance of clause 63 is necessary even as per the said judgement.

9.13 It is further provided in the said judgement that Court would not be justified to appoint arbitrator unless the arbitrator to refuse or neglected to enter upon the reference. In this case, the reference sought of interest was otherwise not grantable. It is settled law that the stale, vague and excluded/non-grantable claims as per clause of contract are not to be referred to the arbitrator and not referring such claims would not be the valid ground for alleging against the arbitrator. Further, in this case even before and after the order under challenge, the arbitrators were appointed but the petitioner has avoided to participate in the said proceedings raising technical points and insisting the reference of the claims which were not otherwise tenable/valid or referable to the

arbitrator. Even non-entertaining of such claims or making reference thereof would give a right to the petitioner to defeat or frustrate the arbitrator appointed. In both the cases the City Civil Court had appointed the arbitrators while passing the order in CMA No. 460 of 1984 and 462 of 1984. But the petitioner did not permit the tribunal to work and later on petitioner filed another CMA in both the matters for appointment of arbitrator, which was otherwise not tenable. It may be pointed out that the order passed in CMA No. 460 of 1984 and 462 of 1984, the constitution of arbitral Tribunal was accepted by the petitioner. In that case second time demand of arbitrator was not justified. It is also pertinent to point out that the person Mr. Kopikar was appointed as umpire and still however the petitioner insisted to appoint him as arbitrator which was practically impossible, once he was appointed as umpire. Accordingly, the petitioner attempted to dictate his own terms contrary to the conditions of contract. Such demand even if straightway denied, cannot be said

to be denial/refusal or neglect on the part of the respondent.

9.14 Thus, it is not the case here that the railway administration has failed to appoint arbitrator and accordingly there is no question of appointing arbitrator by Court. That too of petitioner's choice on the basis of petitioner's dictated term. This is not the case of failure or neglect on the part of the railway administration.

9.15 It is held in the said judgement that when no agreement reached even in the Court between the parties, the Court gets jurisdiction and power. It is not the case here, as stated above in CMA No. 460 of 1984 and 462 of 1984 the arbitral tribunal was constituted and accepted by the petitioner. Thereafter, the functioning there of was disturbed on the ground of reference of items and once again the demand of appointment of arbitrator as per dictate of petitioner was sought. It may be submitted that even in no case,

party can raise a demand for appointment of arbitrator beyond the terms of clause 63. In this very judgement it is held that contract should always be given effect. In that case even if it would have been first time demand and it would have been denied, it cannot be considered as denial/neglect or failure on the part of the respondent when it is contrary to arbitration clause.

9.16 That in this case there was no circumstances for forfeiture of respondent's rights. Following are the further difference between the present case and case reported in AIR 1994 SC 2381 (G. Ramachandra Reddy & Co.)

9.17 There was constitution of arbitral tribunal whereas in this case as referred to above, the arbitrators were appointed and the constitution of arbitral tribunal was accepted by the petitioner.

9.18 There was no order of appointment of

arbitrator. In this case even before filing and after the order under challenge also consistently the arbitrators were appointed.

9.19 In that case it is held that it is averred in the written statement that it was under consideration. Even before the Court he did not state that he was willing to appoint arbitrator. Thus, in the said case, there was total neglect from initial stage, whereas in the present case, the arbitrators wee initially appointed and accepted by the petitioner and said proceedings were disturbed by the petitioner on the ground of non-reference of claim and then filed another CMA for the same relief. The arbitrator appointed, the petitioner insisted for change of their position and status at later stage, which was not permissible in the eye of law. So far as the mode and manner in which the petitioner should appoint is concerned, it was outside the scope of clause 63 – Arbitration clause and non-acting there on can in no case it be said/considered as neglect or failure on the

part of the respondent.

9.20 The learned advocate for the railway submitted that unless there is forfeiture of rights, there is no question of appointing arbitrator by the Court as held even in 1994 SC 2381. In this case, there is no reason to forfeit the authority of the General Manager without any justified cause and no such cause is there. In that case, the judgement reported in 1994 SC 2381 would otherwise not be applicable. Even in the case where there may be forfeiture of General Manager's rights, the conditions of contracts are to be given due regards and it can never be the matter of choice of the petitioner to appoint particular person contrary to the conditions of contract and or to insist particular person to be appointed at particular position, i.e. as umpire or arbitrator. Still, however, the petitioner for the reasons best known to him insisted and attempted to dictate the arbitral proceedings as per his choice and hence the petitioner is not entitled for the relief as claimed for. The

learned advocate for the railway has relied on the following judgements:

1. 2005 ALR 606
2. 1999(8) SCC 604
3. 2006(5) SCC 13

PETITIONER'S REJOINDER:

10. The petitioner has stated that when the trial Court has used discretion only when there are two or more views available to be exercised. In his reasons and the reasoning leading to his not revoking Railway Authority, in paragraph Nos. 34 and 35 the Court clearly explained that as the matter would further be delayed by Railway's appeals etc., he was not revoking the authority. This, after he was convinced that Railway had delayed the matter for 12 years and more. The party in person has cited some of the judgements in this regard.

11. The petitioner therefore submitted that while agreeing with the party in person and also authority cited by the party in person which are binding on the trial Court and therefore it will not be proper for the trial Court to pass just contrary order. Thus the learned Judge has not used its discretion. He has relied on the judgement of the Hon'ble Supreme Court in the case of RAMJI D. VS. INVEST IMPORT reported in AIR 1981 SC 2085 where the Hon'ble Supreme Court has held that “when applied to Court of Justice, discretion means sound discretion guided by law. It must be governed by Rule, not by humour; it must not be arbitrary, vague and fanciful but legal and regular.

11.1 The petitioner has further stated that railway has not raised raised the plea regarding estoppal in CMA No. 150 of 1992 and therefore it cannot raise before this Court particularly when Revision Application is not filed. However, without prejudice to the above, the petitioner clarifies that initial Court orders of 28.12.1983

and 7.10.1987 were consent order, after the Court persuaded the parties to come to terms. Also it is settled law that a Contract or an Agreement, when breached by one party can be revived and parties may opt for entering into a new or same agreement again. No question of estoppal thus arises here.

11.2 The Railway Administration has cited some of the judgements. The petitioner has dealt with this as under:

(1) UNION OF INDIA VS. M.P. GUPTA reported in (2004) 10 SCC 504:

11.3 It is stated that the Railway has not pleaded this point before the trial Court at all. Also it has been effectively dealt with by the petition in his Final Arguments in writing dated 10.12.2006. Without in any way replying to it, the railway has repeated it here. It is repeated that no such arbitration clause Nos. 63 and 64 in anyway apply to these matters.

11.4 The petitioner further submitted that these clauses were amended for the sole reason that S. 8(1)(b) clearly provides “if any appointed arbitrator or umpire neglects or refuses to act..... and the arbitration agreement does not show that it was intended that the vacancy...”

11.5 Therefore so as to make Section 8(1)(b) ineffective and inapplicable to Railway contracts, Railway, like other State Institutions, brought in this express provision that the matter is not to be referred to arbitration at all.

11.6 It was further submitted that same applies to the case of A. Md. Yunus Vs. FCI reported in 2000(2) A.L.R. pg. 2. There also, FCI arbitration clause 19 contains such express provision.

11.7 As regards decision of the Kerala High

Court in the case of NTPC Ltd. Vs. Raghul Constr. Co. reported in 2005(2) A.L.R. there also NTPC arbitration clause contains similar stipulation. The case of “Groupe Chimique Vs. Southern reported in 2006(5) SCC 275 totally relates to ratio of stated provisions of the New Arbitration and Conciliation Act, 1996, which nowhere can be applied to present matter. As regards Shetty Const. Co. Vs. Konkan Railway reported in 1999(8) SCC 604, it actually helps petitioner and positively goes against the Railway. The clauses 62 and 63 therein, though amended, are mostly similar to older clauses 62 and 63. In para 10 at page 612, it is stated that:

11.8 “It is not in dispute between the parties that if it is found on facts that the Appellant-Contractor had followed the gamut of the aforesaid clauses and had carried out his part of the contractual obligations and if the respondent authorities have not responded to the demand for arbitration raised by the

appellant-contractor after following the aforesaid procedure, then there would remain no occasion for the respondent authorities for submitting that the procedure of arbitration and appointment of arbitrators and umpire as laid down by the remaining clauses 63.3(a) etc.. should remain binding between the parties".

11.9 It is a fact, as accepted and admitted by the trial Judge by allowing all his applications in these CMAs that the Contractor had definitely and faithfully fulfilled his part of the arbitration agreement which Railway has also accepted and admitted till date.

11.10 The petitioner has very extensively dealt with all these submissions in all his arguments in writing especially in his last written statement dealt with. He further prayed that his prayer for appointing Sri J.S. Ghelot, Retd. Chief Engineer, W. Railway may be appointed

as arbitrator.

12. Special Civil Application No. 1176 of 2006:

12.1 The petitioner had filed Special Civil Application No. 1176 of 2006 in 2005, delivering a copy to the respondent on 29.1.2005. Anyhow, no reply has so far been filed by the Railway in the matter. It is submitted that some unattested xerox copies of documents are delivered but without any covering letters or list of dates or affidavit in reply etc. As such in absence of any rejection by Railway of his application, the petitioner cannot file any reply/rejoinder whatsoever now. The Court in the judgement has arrived at findings of facts and law clearly holding Railway to be defaulter.

12.2 The petitioner has therefore prayed that Shri C.R. Kalsi, Retired General Manager, Indian Railways, may be appointed as Sole Arbitrator. He has already obtained prior consent of Shri

Ghelot and Shri Kalsi to come to Ahmedabad for the proceeding.

12.3 The petitioner therefore prayed that this Court may be pleased to grant the prayer as prayed for in the petition for appointing arbitrator.

CONCLUSION:

13. Before I consider the rival submissions, I would like to set out Section 8 of the Arbitration Act which provides power of Court to appoint arbitrator or umpire. Section 8 of the Act reads as under:

> “Sec. 8(1) In any of the following cases:
>
> (a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the

parties do not, after differences have arisen, concur in the appointment or appointments;

or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or in incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy;

or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard appoint an arbitrator or arbitrators or umpire as the case may be, who shall have like power to act in reference and to make the award as if he or they had been appointed by consent of all parties.

13.1 This Court also relies on Section 20 of the Arbitration Act which provides that application to file in Court. Section 20 of the Arbitration Act reads as under:

"Sec. 20 Application to file in Court arbitration agreement – (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter

of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) & (3) xxxxxxx

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, where in the agreement or otherwise or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court."

13.2 When this Court has to consider the contention of the petitioner, this Court has to read Section 8 and Section 20 of the Arbitration Act. This Court has also considered the judgement of the Hon'ble Supreme Court in the case of G.

RAMACHANDRA REDDY & CO. VS. CHIEF ENGINEER, MADRAS, MES reported in AIR 1994 SC 2381. The Hon'ble Supreme Court, after referring to its earlier judgement in the case of UNION OF INDIA VS. PRAFULLA KUMAR SANGAL (1979) 3 SCC 631 which has interpreted Section 20(4) of the Act and also the judgement in the case of NANDYAL CO-OP. SPINNING MILLS LTD. VS. K.V. MOHAN RAO (1993) 2 SCC 654 and also Section 8 of the Arbitration Act, in para 6 on page 2383 has ultimately observed as under:

> “Thus when the notice was given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract. When no agreement was reached, even in the court between the parties, the court gets jurisdiction and power to appoint an arbitrator. Even if S. 8(a) per se does not apply, notice was an intimation to the opposite contracting

party to act upon the terms of the contract and his/its non-availment entails the forfeiture of the power to appoint an arbitrator in terms of the contract and gives right to the other party to invoke the court's jurisdiction under S. 20. In the instant case the respondent did not appoint an arbitrator, after the notice was received. The respondent averred in the written statement that it was under consideration. Even before the learned Single Judge he did not even state that he was willing to appoint an arbitrator. The learned Single Judge rightly exercised the power under S. 20(4) of the Act and appointed the arbitrator. The Division Bench, therefore, was not right in holding that the respondent has by giving option to the appellant to agree for appointment of an arbitrator out of the five named persons had left it to the appellant to appoint an arbitrator. On

the other hand, the appointment of an arbitrator made by the learned Single Judge must be deemed to have been approved by us."

13.3 The aforesaid judgement has also been cited before the learned Judge and the learned Judge has also considered the same and he observed that he is bound by the said judgement but he has stated that if the said judgement is accepted then there will be further appeal/revision and the petitioner will not be able to obtain the fruit of decree and therefore he decided to give one more chance to the railway to appoint the arbitrator. The petitioner has seriously assailed the aforesaid order passed by the learned trial Judge. The petitioner has stated that once the Hon'ble Supreme Court's judgement is binding on the learned trial Judge it is not open to the learned trial Judge to say on one breath that the aforesaid judgement is binding and however, thereafter give an opportunity to the railway to appoint arbitrator

though on earlier occasion the railway failed and neglected to appoint the arbitrator. This Court is of the view that the Court could appoint an arbitrator, if the parties could not agree to appoint one or to fill up a vacancy in the office of the arbitrator. This Court is of the view that where the arbitration agreement provides for exhaustive and adequate machinery for appointment of an arbitrator by another person but that person had not made any appointment in spite of the order of the Court then the Court could appoint an arbitrator. Even if the power of appointment of arbitrator was vested in a party, the Court could appoint an arbitrator where that party had not appointed an arbitrator. In this case the Court passed several orders and gave enough opportunities to the railway to appoint their arbitrator. However, the railway failed and neglected to appoint their arbitrator as per the agreement. In such situation the Court should exercise its jurisdiction under Section 8 and Section 20 of the Arbitration Act to appoint an arbitrator. In this case the railway was a party

to the arbitration proceedings initiated by the petitioner. The railway had enough opportunities to put forward their case, but in my view railway has failed and neglected to appoint the arbitrator. In view of the correspondence exchanged between the parties and in view of the orders of the Court below from time to time the railway failed and neglected to pass order of appointment particularly arbitration panel after the order of the trial Court dated 10.6.1996. The petitioner has objected to the appointment made by railway by letter dated 24.3.1984 addressed to the railway General Manager and Arbitrator. This Court is of the view that the railway General Manager continued to refuse to refer the appointment of arbitrator before the trial court and therefore it was obligatory on the part of the trial Court in view of the judgement of the Hon'ble Supreme Court.

13.4 The learned trial Judge has stated that though he has agreed with the submission made by the petitioner, however, in discretion he has not

appointed arbitrator. It is well settled principle that discretion when applied to Court of justice, it means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful but be legal and valid. When the trial Court has power and jurisdiction to exercise its discretion but before that the trial Court has to consider the facts and circumstances of the case particularly pleadings between the parties. The trial Court has also used its discretion when there are two views possible. In this case after the petitioner cited the judgement of the Hon'ble Supreme Court in the case of G. RAMACHANDRA & CO. (supra) it was not open for the trial Court to use his discretion. There was no second view possible as the judgement of the Hon'ble Supreme Court is binding on the trial Court.

14 From the record the following facts emerge:

14.(1) Railway had refused to refer claims

of Contractor to proper arbitration, though correctly demanded by him. Railway also refused to appoint arbitrators correctly and properly in spite of earlier Court orders for the same.

14.(2) Even before the trial Court, railway has vehemently refused to abide by said Court orders and has refused to abide by the parties' arbitration agreement, on the illegal plea that the railway General Manager and not the Court, is supreme in the matters.

14.(3) Railway has continued with its refusals for past 13 years and more and has thus abnormally delayed Contractor's demand for arbitration.

14.(4) As railway defaulted as above in terms of the ratio and principles of the Apex Court authorities cited by the petitioner, railway's authority to appoint arbitrators should be revoked and this Court should appoint independent arbitrators for resolving

contractor's disputes.

15. In view of this position, it is not open for the trial Court to say that the judgement of the Hon'ble Supreme Court is binding but still he gives one chance in his discretionary order to the railway to appoint the arbitrator. The said power of discretion is not in accordance with law. It is contrary to the records of the case. The learned trial Judge ought to have considered the following facts:

15.(1) The General Manager had not referred all the disputes raised by the contractor-applicant and had directed the arbitrator not to decide certain claims considering the same as out of the terms of contract.

15.(2) Now more than 13 years have passed and opponents have not appointed the arbitrator who can function conveniently and decide the dispute of the applicant. So it is mainly submitted by the applicant that the opponents

have refused to appoint arbitrators.

15.(3) The General manager has acted in a prejudiced manner. He has acted unfairly in issuing letter of appointment and willfully continued the misconduct. He has acted against the order of the Court in C.M.A. No. 126 of 1983 and 532 of 1986.

15.(4) So the General Manager has forfeited all of his rights and powers bestowed upon him and same is to be revoked and independent arbitrator be appointed to resolve the dispute between them.

16. The petitioner has also stated that the aforesaid exercise of discretion by the learned trial Judge is without jurisdiction. The expression jurisdiction does not mean power to do or order to act impugned, but generally the authority of the judicial officer to act in the matter. (ANWAR HUSAIIN VS. AJOY KUMAAR MUKHERJEE reported in AIR 1965 SC 1651.

17 In other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term “jurisdiction” which has been stated to be.

18. Exercise of the power may be necessary if it is shown that grave injustice has been done to a party and the case is a fit case. (OOUSHEF MATHAI VS. M.A. KHADIR reported in AIR 2002 SC 110.

19. But no such jurisdiction is vested in the trial Court for exercising such extempore and ex-parte orders against law. There is not a single law empowering trial Court for this exercise.

20. Totally identical and similar C.R.A. Nos. 669 and 671 of 1990 were allowed by this Court.

Intervening, this Court set aside order of the trial Court and appointed retired railway Officers as arbitrators. The Hon'ble Supreme Court confirmed the same.

21. These C.R.A. Nos. 322 of 1997 and 594 of 1997 would have been favourable decided if same were heard with C.R.A. Nos. 669, 670 and 671 of 1990. Unfortunately, this Court being busy, the same were kept pending when CPC amendment of S. 15 came into effect. A litigant, innocent party cannot be punished for no fault of his, especially when he is fighting for past more than 25 years.

22. In view of the same, the present petitions are allowed. The order of the trial Judge is quashed and set aside. This Court directs that the arbitrators, namely, Shri J.S. Gehlot, Retired Chief Engineer (in Spl. C.A. No. 13384 of 2004 and Shri C.R. Kalsi, Retired General Manager (in Spl. C.A. No. 1176 of 2006) may be appointed.

(K.M. MEHTA, J)

After pronouncement of the matters, Mr. Mukesh Patel, learned advocate for the railway, prays for stay of this judgement for some time in order to approach the Hon'ble Supreme Court. His request is granted. This judgement is stayed for 15 days from today in order to approach the Hon'ble Supreme Court.

(K.M. MEHTA, J)

(pkn)